

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	GREGORY G. GARRE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOSEPH R. PALMORE, ESQ.	
7	For United States, as amicus curiae,	18
8	supporting the Petitioner	
9	ORAL ARGUMENT OF	
10	GLEN P. GIFFORD, ESQ.	
11	On behalf of the Respondent	28
12	REBUTTAL ARGUMENT OF	
13	GREGORY G. GARRE, ESQ.	
14	On behalf of the Petitioner	50
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: Mr. Garre, welcome
back.

ORAL ARGUMENT OF GREGORY G. GARRE
ON BEHALF OF THE PETITIONER

MR. GARRE: Thank you, Your Honor, and may
it please the Court:

The question in this case is when does a
trained drug detection dog's alert to a vehicle
establish probable cause to search the vehicle?

JUSTICE SCALIA: Are you for or against the
dog this time?

MR. GARRE: For it again, Your Honor.

JUSTICE SCALIA: For it again.

MR. GARRE: The Florida supreme court
answered that question by erecting what we think is an
extraordinary set of evidentiary requirements that, in
effect, puts the dog on trial in any suppression hearing
in which defendant chooses to challenge the reliability
of the dog.

I think, most fundamentally, the problem
with the court of appeals' -- the Supreme Court's
decision -- is that it misconceives what this Court's
cases conceive of the probable cause requirement,

1 converting probable cause, which this Court has referred
2 to as a substantial chance, or fair probability, of the
3 detection of contraband or evidence of a crime, into
4 what amounts to a continuously updated batting average
5 and a requirement that dogs be virtually infallible.

6 That -- that --

7 JUSTICE SOTOMAYOR: Mr. Garre --

8 JUSTICE GINSBURG: That -- that goes to the
9 field performance; but, the other requirements, that
10 the -- some showing -- the test -- that the training
11 program is reputable, some showing that the handler, not
12 only the dog, that is -- has had training, it seems to
13 me those two are not -- there's nothing improper about
14 that.

15 MR. GARRE: Well, and I think, Your Honor,
16 under our view of it, it's okay to inquire into whether
17 or not the dog has successfully completed a bona fide
18 training program, which -- which we think is a training
19 program in which the dog is going to be tested for
20 proficiency, including in a setting where some vehicles
21 have drugs and some vehicles don't.

22 And Aldo, the dog in this case, clearly was.
23 He'd received a 120-hour training program with the
24 police department in Apopka, Florida. He received a
25 40-hour refresher seminar by another police department

1 in Dothan, Alabama. And he was subjected to continuous
2 weekly training, in which part of that training
3 consisted of taking him out, walking him by some
4 vehicles that contained cars, some vehicles that didn't.

5 And the testimony of Officer Wheatley was
6 that Aldo's performance was really good. And what he
7 meant by that was that if there were eight cars with
8 drugs.

9 JUSTICE GINSBURG: Then why did -- then why
10 didn't they get the dog recertified? By the time of the
11 search, the certification had expired 16 months.

12 MR. GARRE: It was a lapse, Your Honor. The
13 dog subsequently was recertified.

14 Our position is that the Fourth Amendment
15 doesn't impose an annual certification requirement.
16 Some states have it, some states don't.

17 I think, more important in this case was the
18 fact that the dog was continuously trained, continuously
19 evaluated and trained.

20 JUSTICE GINSBURG: Well, what do you -- what
21 do you have to show to establish that the dog was well
22 trained.

23 MR. GARRE: Well, Your Honor, I think the
24 most important thing is successful completion of
25 proficiency testing.

1 I mean, what -- what our friends would like,
2 and what the Florida supreme court would like, was
3 really for the courts to delve into all aspects of the
4 training, what types of distracters were used, what type
5 of smell and printing was used and the like.

6 JUSTICE GINSBURG: Well, if it were just
7 that -- you have the show that the program was
8 reputable.

9 MR. GARRE: Well, certainly that it was
10 authentic, Your Honor. And here, the programs were --
11 were conducted by actual police departments in -- in
12 Alabama and Florida. And this Court ordinarily would
13 presume regularity in those sorts of training settings.

14 And there's no reason to approach the
15 training of a dog any differently, but --

16 JUSTICE SOTOMAYOR: I thought all of these
17 training facilities were private entities that
18 contracted with police departments.

19 MR. GARRE: No, Your Honor. The
20 certification. Certification usually is done by private
21 entities which are operated by former law enforcement
22 officers. But the training itself, it usually and here
23 was done by police departments themselves.

24 JUSTICE SOTOMAYOR: Could I go back to
25 Justice Ginsburg's question? There's no -- what I

1 hear -- read the Florida court saying is there's no
2 national standard for certification. That's correct?

3 MR. GARRE: Yes.

4 JUSTICE SOTOMAYOR: There's no national
5 standard that defines what's adequate training, correct.

6 MR. GARRE: That's right. There --

7 JUSTICE SOTOMAYOR: So -- let me just finish
8 my question. So assuming there's no national standards,
9 then how do you expect a judge, without asking questions
10 about the content of the certification process, the
11 content of the training process, and what the results
12 were and how they were measured, how do you expect a
13 judge to decide whether the certification and the
14 training are sufficiently adequate.

15 MR. GARRE: And I think that the central
16 inquiry that we would think the judge would undertake is
17 to determine whether or not the dog was performing
18 successfully in proficiency testing.

19 After all, that's why we train the dogs.
20 And --

21 JUSTICE SOTOMAYOR: But you still have to
22 ask what that training was, and the judge still has to
23 determine whether the judge believes it was adequate,
24 correct? That's what the totality of circumstances
25 requires.

1 MR. GARRE: Well, Your Honor, in our view,
2 we don't think it's -- it's an appropriate role for the
3 Court to delve into the contours of the training, what
4 specific methods were used to train or distract or --
5 you know, all the contours that they bring up in their
6 brief.

7 JUSTICE SOTOMAYOR: So what does a judge do,
8 just say, the police department says this is adequate,
9 so I have to accept it's adequate?

10 MR. GARRE: Not -- you would have to accept
11 it, Your Honor, on its face. I think you -- in a record
12 like this -- and I think this record is clearly
13 sufficient -- and, ultimately, that's what we're asking
14 this Court to hold -- what you have in the record
15 is evidence --

16 JUSTICE SOTOMAYOR: Mr. Garre, I -- I have
17 no problem that this record -- with this record. My
18 problem is how do we rule.

19 Because it seems the me that I'm not quite
20 understanding what -- how -- the legal rule you're
21 asking us to announce. I think the legal rule, you're
22 saying, if the dog has been tested for proficiency by a
23 police department's determination of what's adequate for
24 proficiency, that establishes probable cause. That's
25 what I think the rule you want us to -- to do.

1 I don't know what the role of the judge is
2 in that --

3 MR. GARRE: I think it would be close --

4 JUSTICE SOTOMAYOR: -- with that rule.

5 MR. GARRE: -- close to that. We would ask
6 whether or not the dog successfully treated -- completed
7 training by a bona fide organization. And here --

8 JUSTICE SOTOMAYOR: No certification, no
9 questioning of the handler and the handler's training?
10 The judge can't do any of that and shouldn't do any of
11 that, is what you're saying.

12 MR. GARRE: Certification is not required.
13 It may be one way that the police department could
14 establish reliability a different way, but certification
15 itself is not required when you have a record of the
16 type of training that you have here.

17 We do think that you could put the handler
18 on the stand and ask about the reliability, certain
19 questions about reliability.

20 We don't think, in a record like this, the
21 judge would say, well, it says that he completed 120
22 hours in narcotics detection at the Apopka, Florida
23 police department, and 40 hours at the Dothan police
24 department, so --

25 JUSTICE SOTOMAYOR: So it's not enough for

1 you to win by us saying that a court can't insist on
2 performance in the field records, that it has to look at
3 the totality of the circumstances.

4 What other case have -- have we announced,
5 under a totality of the circumstance test, a absolute
6 flat rule like the one you're proposing? Where else
7 have we said that one thing alone establishes probable
8 cause --

9 MR. GARRE: Your Honor --

10 JUSTICE SOTOMAYOR: -- that one factor
11 alone.

12 MR. GARRE: -- I think one area where the
13 Court mentioned that was in the Lago Vista case, where
14 it talked about the importance of clear rules for police
15 officers --

16 JUSTICE SCALIA: You know, I suppose that if
17 the reasonableness of a search depended upon some
18 evidence given by a medical doctor, the Court would not
19 go back and examine how well that doctor was trained at
20 Harvard Medical School and, you know, what classes he
21 took and so forth, right.

22 MR. GARRE: Absolutely. And the same way
23 that when an officer provides evidence for a search
24 warrant, we don't demand the training of the officer,
25 what schools he went to or what specific courses he had

1 in probable cause.

2 JUSTICE GINSBURG: Mr. Garre, you said there
3 was the certification, training program, but you gave a
4 third. You said, or otherwise show proficiency in
5 locating narcotics.

6 So if there is no certification, no
7 training, how would the state establish that the dog was
8 reliable in detecting drugs?

9 MR. GARRE: Your Honor, I think that that
10 would be the unusual case, and it probably would be
11 captured by the other factors; but, what we meant by
12 including that is that there's no limit on the types of
13 evidence that the police could submit to show
14 reliability.

15 If you didn't have certification or a formal
16 training program, the fact that there was evidence that
17 a dog like Aldo successfully performed in weekly
18 training over the course of the year, and the police
19 submitted the records, like the records in the Joint
20 Appendix in this case at pages 106 and 116, that might
21 be another way of establishing reliability.

22 But the -- the central way would be showing
23 that the dog successfully completed training or that the
24 dog was certified.

25 JUSTICE GINSBURG: And I think you'll agree

1 that the handler, too, the handler would have to --

2 MR. GARRE: Well, Your Honor, we don't think
3 there is a Fourth Amendment requirement of certification
4 for handlers. Again, this is something that varies
5 among states.

6 JUSTICE GINSBURG: Not -- not certification,
7 but that the handler has been -- has been trained --

8 MR. GARRE: Yes.

9 JUSTICE GINSBURG: -- to work with drug
10 detection dogs.

11 MR. GARRE: That's correct. And Officer
12 Wheatley here, of course, had been trained. He had
13 gotten a 160-hour course in narcotics detection, and had
14 done training with Aldo in the Dothan, Alabama police
15 department, 40 hours there.

16 And these dog -- the dog, Aldo, and Officer
17 Wheatley had worked together for about a year before the
18 time of the search.

19 The handlers themselves are going to be in
20 the best position to know the dogs and evaluate their
21 reliability. And they have a strong incentive to ensure
22 the dogs are reliable. That's both because they don't
23 want to miss contraband when it's available -- when it
24 exists in the field; and, also, they don't want to be
25 put into harm's way.

1 The traffic stop, in particular, is one of
2 the most dangerous encounters police officers face.
3 They're not going to want to be working with a dog that
4 is consistently putting the officer in a position of
5 searching cars based on an alert when that dog is not
6 reliable in predicting the presence --

7 JUSTICE SOTOMAYOR: Counsel, I'm somewhat
8 troubled by all of the studies that have been presented
9 to the Court, particularly the Australian one where,
10 under a controlled setting, one dog alerted correctly
11 only 12 percent of the time.

12 How and when and who determines when a dog's
13 reliability in alerting has reached a critical failure
14 number? And what is -- what do you suggest that number
15 is, and how does a judge determine that that's being
16 monitored?

17 MR. GARRE: We don't think the
18 Fourth Amendment puts a number on it. This Court has
19 rejected a numerical conception of probable cause.

20 But with respect to --

21 JUSTICE SOTOMAYOR: Well, I'm deeply
22 troubled by a dog that alerts only 12 percent of the
23 time. That whatever -- whether we have a fixed number
24 or an unfixed number, that seems like less than
25 probability for me.

1 MR. GARRE: But, but let me -- let me
2 address the, the South Wales study, Your Honor, which I
3 think is the one that you were referring to and it's the
4 primary one relied on by the other side. In that case
5 they reported that over the course of several years the
6 dogs' alerts resulted in discovery of drugs only 26
7 percent of the time.

8 But there is another part of that study
9 which doesn't come up in the amicus briefs, and that's
10 that in 60 percent of the other cases the individuals
11 admitted to using drugs or being in the proximity of
12 drugs. And if you include that in the universe of
13 accurate alerts, as you should, then the number becomes
14 70 percent of dogs accurately alerting. That 70 percent
15 based on the primary study that they rely upon --

16 JUSTICE SOTOMAYOR: That doesn't answer what
17 happens to the dogs who have -- dogs grow old. They are
18 taken out of service for a reason. So how -- how is a
19 court supposed to monitor whether or not a dog has
20 fallen out of --

21 MR. GARRE: Well, primarily by looking at
22 whether the dog has successfully completed training.
23 And you're right, dogs do go out of service when they
24 reach a certain age. Dogs, like humans, become old and
25 impaired over time. But -- but looking at weekly

1 training records, like are available in this case, dogs
2 that successfully perform week in and week out in
3 training are going to successfully perform in the -- in
4 the real world.

5 And, after all, I think the most problematic
6 aspect of the challenges to the reliability of these
7 dogs is that law enforcement agencies across the country
8 at the state and Federal level, law enforcement agencies
9 around the world, and law enforcement agencies that
10 protect this Court rely on detection dogs as reliable
11 predictors of the evidence of contraband, evidence
12 of the presence of explosives or likewise.

13 And this is an area where we think that a
14 page of logic and experience is worth a volume -- a page
15 of experience and history is worth a volume of logic.
16 These dogs have been used and are being used in many
17 settings across the country and across the world today.
18 And the reason they are being used is because the people
19 who work with them know that they are reliable and --
20 and know by experience that they are reliable.

21 And that's one of the central problems we
22 have with the argument on the other side, is that
23 ultimately this Court should distrust the reliability of
24 the dogs. And again --

25 JUSTICE KAGAN: Well, Mr. Garre, could I

1 understand your argument? Because -- suppose in a case
2 the government comes in, says this dog has been through
3 training and the handler has been through training. And
4 this is a case in which -- this is never going to come
5 up when the dog actually alerts to narcotics; it's not
6 worth anybody's time at that point.

7 It's only going to come up in a case like
8 this, where a dog alerts to narcotics, there is no --
9 there are no narcotics, but something else is found, and
10 so the person ends up being criminally prosecuted. So
11 it's, you know, a small universe of cases.

12 So the government comes in and says that the
13 dog has been trained. Can -- can the criminal defendant
14 at that point call the handler, say, how has the dog
15 been trained, what are the methods that -- that the dog
16 has -- was used, and how did the dog do in training?
17 Can the -- can the defendant do that.

18 MR. GARRE: Your Honor, I think that the
19 defendant can call the handler and can ask those sorts
20 of questions. I think the court would cut it off if you
21 got into questions like, well, did they use the
22 play-reward or the scent-imprinting method in training.
23 Well, what specifics -- because I think that delves too
24 far into the details.

25 JUSTICE KAGAN: But you can ask questions

1 like how did the dog do in training.

2 MR. GARRE: Yes, and that was done here.

3 JUSTICE KAGAN: And how about if you really,
4 if there were some articles that said, you know, that
5 there was a certain kind of method that, for example,
6 led to a lot of subconscious cueing by the handler.
7 Could the -- could the criminal defendant say, did you
8 use that method that leads to these problematic results?

9 MR. GARRE: I -- I don't think so, Your
10 Honor. First of all, cueing is not part of this case
11 because they haven't argued that the dog was cued. The
12 argument is the dog was just sort of inherently
13 reliable.

14 JUSTICE KAGAN: I'm using "cueing" not in
15 terms of any intentionality, but one thing that I
16 learned in reading all of this was that one difficulty
17 here is that dogs respond to subconscious cues and that
18 there are different ways of training that make that less
19 or more of a problem.

20 MR. GARRE: And our position is, is that you
21 can inquire into cueing during this hearing, that the
22 defendants can -- can argue that the dog was cued, and
23 in -- in the course of that argument you might be able
24 to get into those sorts of things. That's different
25 than the challenge that was made here. There wasn't a

1 cueing challenge made in this case.

2 I would like to just go back to one of the
3 premises of your question, which is that the dog in this
4 case didn't accurately alert. The dog in this case
5 accurately alerted to the odor of illegal narcotics.

6 JUSTICE KAGAN: Yes, I didn't mean to say
7 that. I just meant to say that there were -- there were
8 no drugs found.

9 MR. GARRE: Right. And, and I think that's
10 another central problem with the Florida supreme court's
11 decision, is this notion that alerts to so-called
12 residual odors aren't indicative of the dog's
13 reliability. A dog's alert to the lingering odor of
14 methamphetamine which was in the car, must have been in
15 the car in this case, is just as accurate as a dog's
16 alert to the presence of methamphetamine itself in the
17 car.

18 If I could reserve the remainder of my time
19 for rebuttal?

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MR. GARRE: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Palmore.

23 ORAL ARGUMENT OF JOSEPH R. PALMORE,

24 FOR UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING THE PETITIONER

1 MR. PALMORE: Mr. Chief Justice and may it
2 please the Court:

3 This Court has long recognized the ability
4 of trained dogs to reliably detect target odors and such
5 dogs every day perform critical life and death homeland
6 security and law --

7 JUSTICE SOTOMAYOR: Counsel, I have two
8 separate questions for you. Tying the earlier case a
9 little bit to this one, I am assuming that your position
10 is -- and you'll tell me what the legal standard is --
11 that a well-trained dog, if he alerts, or walks by a row
12 of apartments, a row of houses, and alerts to drugs,
13 that that simple alert is probable cause for the police
14 to get a search warrant.

15 MR. PALMORE: Yes, we believe that an alert
16 by a trained dog is sufficient to establish probable
17 cause.

18 JUSTICE SOTOMAYOR: So that, without any
19 other information about -- unlike the earlier case or
20 this one, where the police officer saw the individual
21 being nervous, et cetera, et cetera -- that all -- all
22 it takes is a dog alert, despite the fact that there is
23 no study that says the dogs reliably alert 100 percent
24 of the time?

25 MR. PALMORE: 100 percent of the time is of
19

1 course not required for probable cause.

2 JUSTICE SOTOMAYOR: No, I -- I understand.

3 MR. PALMORE: It's a fair probability
4 standard and certainty is not required, and I think that
5 was the principal and fundamental flaw of the Florida
6 supreme court. It demanded infallibility where
7 infallibility is not required.

8 In terms of studies, it is actually well
9 studied --

10 JUSTICE SOTOMAYOR: So -- so shouldn't we be
11 addressing the question whether a -- an alert,
12 especially outside a home in particular, should be,
13 standing by itself, enough?

14 MR. PALMORE: I think what the Court -- of
15 course reliability is important. The question is how
16 you determine reliability. This is a somewhat unique
17 setting where the law enforcement tool is actually
18 tested initially and on an ongoing basis in a controlled
19 setting to establish its reliability. Your Honor asked
20 what the standard for bona fide training is.

21 We think the -- the important point is the
22 outcome of the training: Is the dog proficient? Can
23 the dog reliably detect narcotics odor and only
24 narcotics odor in a controlled setting where false
25 positives and false negatives can accurately be

1 measured? That record is established here.

2 JUSTICE SOTOMAYOR: Well, only because the
3 officer said that he satisfactorily performed --

4 MR. PALMORE: Well --

5 JUSTICE SOTOMAYOR: -- and what the Florida
6 court said: But we don't know what that means.

7 MR. PALMORE: Well, we -- I think we do know
8 what it means, Your Honor. There are two different
9 showings that are made here. There is a formal training
10 and formal certification, both for the dog and the
11 handler separately, and then a separate training, formal
12 training together.

13 But then, just as important, you have
14 ongoing, but less formal, proficiency exercises
15 conducted by the handler in which the dog, in a
16 controlled setting where errors could reliably be
17 identified, performed quite strongly, including 2 days
18 before the arrest here. So that's JA 113 on June 22nd,
19 the dog performed perfectly in a controlled setting.

20 And we have -- there are records in this
21 case going back several months before the arrest and
22 several months after the arrest showing that -- that
23 this dog passed the test, this dog was reliable.

24 CHIEF JUSTICE ROBERTS: And you agree that
25 that's an appropriate area of inquiry?

1 MR. PALMORE: We think it is.

2 CHIEF JUSTICE ROBERTS: The judge,
3 presented with, here's Aldo, he was -- went to this
4 school, he was certified, the judge can say, when was he
5 last tested, right? When did he last go through some --

6 MR. PALMORE: Yes, I think the judge can ask
7 those kinds of questions.

8 CHIEF JUSTICE ROBERTS: The -- the only
9 thing really you say they can't ask about is what's --
10 what's his record.

11 MR. PALMORE: Well, there is a question --
12 there are a couple sub-issues here. The principal vice
13 of the Florida supreme court was in imposing an
14 unprecedented and inflexible set of evidentiary
15 obligations that are part of the government's
16 affirmative case that the government has to always
17 introduce any time it seeks to establish probable cause
18 based on a dog alert. We think that's fundamentally
19 misplaced for a -- for a variety of reasons.

20 The question of what the government -- what
21 are fair game questions for a defendant to ask once the
22 handler is on the stand is a -- is a different question.
23 And --

24 JUSTICE KENNEDY: And judges do this
25 thousands of times in thousands of cases. They ask:

1 Was the tip reliable? There are any number of
2 permutations. It's a question of whether or not the
3 trial judge was -- made a correct determination in
4 determining that there was or was not sufficient cause
5 for the police to proceed. It just happens every day.

6 MR. PALMORE: I think that's right, Your
7 Honor, but I think the -- the critical aspect of
8 reliability in this context is the dog's performance in
9 a controlled setting.

10 JUSTICE GINSBURG: Mr. Palmore, you
11 criticize the Florida supreme court for requiring
12 evidence of field performance; and, assuming that that
13 evidence is not required, if the defendant, in preparing
14 for the suppression motion, wants what information there
15 is, would it be proper to seek -- for the defendant --
16 would it be permissible for the defendant to speak -- to
17 seek through discovery whatever field performance
18 records there are?

19 MR. PALMORE: We don't think so, certainly
20 not as a routine basis. The kind of burden that that
21 might impose on law enforcement we don't think is
22 justified.

23 That's a separate question from whether the
24 defendant can ask the handler, if the handler is on the
25 stand, about field performance, and then the court can

1 give that answer whatever weight is appropriate.

2 We think, typically, an answer on field
3 performance is not going to be material. It's not going
4 to be helpful. Because the problem is in the field,
5 when a dog alerts, the dog is trained to alert to the
6 odor of drugs.

7 It's like a -- what the -- Florida supreme
8 court wanted a batting average, a batting average that
9 would be calculated when we know the number of at bats,
10 but we don't know in many cases whether there was a hit
11 or an out. So we had a fraction where we know the
12 denominator but not the numerator.

13 The answer to the Florida supreme court's
14 question and concern about reliability, again, is to go
15 back to the controlled setting, where we know what's a
16 hit and what's an out, and we can calculate a reliable
17 batting average. That needs to be where the focus
18 should be in determining the reliability of a dog.

19 And there should -- there's no reason to
20 constitutionalize the process or the training
21 methodologies that get you to that point. What matters
22 is, is this dog successful in a setting in which we can
23 measure success.

24 And I think that it's also important to
25 point out that the Florida court was basically alone in

1 establishing these unprecedented and inflexible sets of
2 evidentiary requirements.

3 There is a large body of case law in the
4 lower courts on the reliability of drug detection dogs
5 going back 30 or 40 years, and there are no other
6 courts, no other appellate courts to be sure, that have
7 imposed these kinds of requirements on law enforcement
8 when it seeks to establish probable cause for a
9 detection -- for after a detection dog alerts.

10 JUSTICE KAGAN: If you take out the Florida
11 supreme court and this one trial court in Massachusetts,
12 basically you think what courts have been doing is the
13 right thing?

14 MR. PALMORE: In general. There is some
15 diversity across the courts, but I think that if you
16 look at Judge Gorsuch's opinion in the Ludwig case from
17 the Tenth Circuit, or the Jones case from the Virginia
18 supreme court, you see approaches that are basically
19 sound, where courts have confidence that if law
20 enforcement comes in and says, this dog is trained and
21 has demonstrated proficiency in a training setting, that
22 that dog is generally reliable.

23 And I think, as Mr. Garre --

24 JUSTICE KAGAN: But where at the same time
25 they'll allow a defendant to question the handler about

1 that training, about how the dog has performed in that
2 training; is that right?

3 MR. PALMORE: Yes. Those questions can be
4 asked.

5 But I think it's critical, as Mr. Garre
6 pointed out, that the courts not constitutionalize dog
7 training methodologies or hold mini trials with expert
8 witnesses on what makes for a successful dog training
9 program. Because, as Mr. Garre said, the government has
10 critical interests, life and death interests, that it
11 stakes on the reliability of these dogs.

12 So the U.S. Marshals use dogs to protect
13 Federal judges. The Federal Protective Services use
14 dogs to keep bombs out of Federal buildings. The TSA
15 uses dogs to keep bombs off of airplanes. FEMA uses
16 dogs to find survivors after hurricanes.

17 There are 32 K-9 teams in the field right
18 now in New York and New Jersey looking for survivors of
19 Hurricane Sandy.

20 So, in situation after situation, the
21 government has in a sense put its money where its mouth
22 is, and it believes at an institutional level that these
23 dogs are quite reliable. And I think the courts --

24 CHIEF JUSTICE ROBERTS: Do you -- I'm not
25 sure it's relevant, but do dogs -- does their ability --

1 is it even across the board? In other words, if you
2 have a dog that's trained and good at sniffing out
3 heroin, the same dog is going to be good at detecting a
4 bomb, or is there some difference?

5 MR. PALMORE: No, there -- well, I think any
6 dog could be trained in either discipline. And if you
7 look at the Scientific Working Group on Detection Dogs
8 report that we cite in our brief, the report explains
9 that the same general methodologies and the same
10 different -- same general approach is used to train each
11 kinds of dogs. But, typically, a drug detection dog
12 will not be cross-trained on explosives.

13 CHIEF JUSTICE ROBERTS: So you don't know
14 whether -- in other words, are dogs good at sniffing
15 things, or are they -- can they be good at bombs, but
16 not good at meth?

17 MR. PALMORE: Well, I don't know the
18 specific answer to that. I think once a dog kind of
19 chooses a major, that's what they stick with. But I
20 think the important point is that --

21 JUSTICE SCALIA: You don't want coon dogs
22 chasing squirrels.

23 MR. PALMORE: Right. But I think the
24 important point is that these dogs have to meet -- have
25 to pass proficiency in an initial training program, and

1 then they, as is shown in the record here in great
2 detail, they show proficiency on an ongoing basis,
3 including in this case two days before the arrest.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Gifford.

7 ORAL ARGUMENT OF GLEN P. GIFFORD

8 ON BEHALF OF THE RESPONDENT

9 MR. GIFFORD: Mr. Chief Justice, and may it
10 please the Court:

11 There is no canine exception to the totality
12 of the circumstances test for probable cause to conduct
13 a warrantless search. If that is true, as it must be,
14 any fact that bears on a dog's reliability as a detector
15 of the presence of drugs comes within the purview of the
16 courts. This can encompass evidence of initial
17 training, certification, maintenance training and
18 performance in the field.

19 JUSTICE KENNEDY: Do you understand the
20 government to disagree with that general position? In
21 other words, the trial court, if you have an attorney
22 that's really concerned about the training of this dog,
23 they can ask about it.

24 MR. GIFFORD: I do understand the government
25 to disagree about the relevance of field performance.

1 And where I specifically think the government disagrees
2 is on the level of detail that can be inquired into by
3 the trial court on any of these elements.

4 JUSTICE BREYER: I didn't think they
5 disagreed about what he may do; I thought they disagreed
6 about what he must do. That is, the Florida supreme
7 court said you must, da, da, da, da, da, and gave a
8 whole list. I thought that's what the case was about.

9 MR. GIFFORD: Well, the Florida supreme
10 court did have several passages in its opinion where it
11 talked about what the state must produce. And at first
12 glance, that looks rather didactic.

13 However, what I think the Florida supreme
14 court was saying there was that if this -- these records
15 exist, the state must produce them. And that is
16 consistent with the state's burden of proof to justify a
17 warrantless search.

18 JUSTICE BREYER: Well, that's a totally
19 different matter. Of course, I agree with you that a
20 trial judge has control of the trial. He's likely to
21 know what's relevant. In different circumstances,
22 different matters will be, and he has first say on what
23 you're going to go into. It's the must.

24 And now you're on the point. Why is that
25 the right list? I mean, what in the Constitution

1 requires that list?

2 MR. GIFFORD: I don't believe the
3 Constitution requires it, and I don't believe --

4 JUSTICE BREYER: Doesn't the Supreme Court
5 believes the Constitution requires it?

6 MR. GIFFORD: No, I don't think so, even
7 though they used the word "must." I think that the
8 "must" concerns performance records and training records
9 that exist.

10 Farther down in the opinion, the court says
11 reasons why the -- why the state should keep and present
12 performance records --

13 JUSTICE BREYER: But what --

14 JUSTICE GINSBURG: So if the state doesn't
15 keep -- if the state doesn't keep any performance
16 records, then there would be no field performance to
17 show, but that doesn't mean the state loses; is that
18 what you're saying?

19 The state doesn't keep performance records.
20 The Florida supreme court seems to say field performance
21 records are required.

22 MR. GIFFORD: If the state does not keep
23 field performance records, that is a fact, that is a
24 lack of evidence that could be held against the state in
25 the suppression hearing. And it shifts the focus onto

1 providing evidence of the initial training, the
2 certification, and the maintenance training that can
3 show to the trial court that this is a reliable dog.

4 JUSTICE SCALIA: Now I thought the
5 court said -- held against the state. I thought what
6 the Florida court was saying is if you didn't produce
7 it, the dog's evidence would -- would not be allowed --

8 MR. GIFFORD: They did use --

9 JUSTICE SCALIA: -- the search is invalid.

10 MR. GIFFORD: The court did use the word
11 must --

12 JUSTICE SCALIA: Yes.

13 MR. GIFFORD: -- but it's not -- it's not a
14 specific recipe that can't be deviated from. Because,
15 in addition to listing the records that must be
16 produced, the Florida supreme court also said, and all
17 other evidence that bears on the reliability of the dog.

18 JUSTICE SCALIA: Even worse.

19 MR. GIFFORD: So it's not a specific recipe,
20 and it's talking about what -- if these records exist,
21 they must be produced.

22 JUSTICE GINSBURG: Are you conceding that
23 the Florida supreme court, at least with respect to the
24 field performance records, was wrong, that they -- it is
25 not a Fourth Amendment requirement?

1 MR. GIFFORD: I don't think they -- I don't
2 think they require field performance records to
3 establish --

4 JUSTICE GINSBURG: But they outline what the
5 government must prove, and that was one of them.

6 MR. GIFFORD: They said what the government
7 must produce if those records exist. But when you go
8 down to the part of the opinion where the court applies
9 the law to the facts, the court didn't just say, because
10 there were no field performance records, no probable
11 cause, we close up shop, conviction reversed.

12 What the court did was take into
13 consideration the lack of field performance records, the
14 lack of any records about initial training and
15 certification aside from the fact that this dog had a
16 certificate.

17 And we have to remember that this
18 certificate, not only was it 16 months out of date, it
19 wasn't a certificate for Aldo. It was a certificate for
20 Aldo and a Seminole County deputy together as a team.

21 This dog was never certified as part of a
22 team with Officer Wheetley in this case. And the
23 certifications in this area are team certifications, not
24 individual certifications.

25 JUSTICE SCALIA: Is that a requirement too?

1 That's a constitutional requirement, that the dog
2 training doesn't count unless it's training with the
3 officer who is using the dog?

4 MR. GIFFORD: No, but that's an indicator of
5 reliability, which is the ultimate test here, has this
6 team been trained and certified together --

7 JUSTICE SCALIA: Well, fine. counsel can
8 bring that up. Counsel can bring that up at the hearing
9 before the judge. But -- but I understood this to be
10 a -- a requirement. You never even get to that hearing,
11 because there's no evidence that this dog was ever
12 trained with this policeman.

13 MR. GIFFORD: That's correct, there is no
14 such evidence.

15 JUSTICE SCALIA: Yes, and therefore end of
16 case, right?

17 MR. GIFFORD: No, not end of case. The fact
18 that the dog wasn't trained with this policeman means
19 that you need to look for evidence -- other evidence of
20 reliability, which also doesn't exist in this case.

21 JUSTICE SCALIA: Well --

22 JUSTICE GINSBURG: Doesn't this -- this
23 officer has been working with this dog for many months.
24 They have training periods every week. So why isn't
25 that enough to show that this handler and this dog

1 worked effectively as a team?

2 MR. GIFFORD: Well, first, this weekly
3 training is maintenance training. It's to maintain the
4 dog at a level of proficiency that has previously been
5 established. That level of proficiency hadn't been
6 established with this team of Wheetley and Aldo. The
7 level of proficiency that had been established was with
8 Wheetley and with another Seminole County deputy.

9 JUSTICE SCALIA: What -- what -- what are
10 the -- what are the incentives here? Why would a police
11 department want to use an incompetent dog? Is that any
12 more likely than that a medical school would want to
13 certify an incompetent doctor? What -- what incentive
14 is there for a police department?

15 MR. GIFFORD: The incentive is to acquire
16 probable cause to search when it wouldn't otherwise --
17 otherwise be available.

18 JUSTICE SCALIA: And that's a good thing?

19 MR. GIFFORD: Is that a good thing?

20 JUSTICE SCALIA: I mean, you acquire
21 probable cause, you go in and there's nothing there.
22 You've wasted the time of your police officers, you've
23 wasted a lot of time.

24 MR. GIFFORD: And -- and you've invaded the
25 privacy of an individual motorist who was innocent.

1 JUSTICE SCALIA: Well, maybe the police
2 department doesn't care about that, but it certainly
3 cares about wasting the time of its police officers in
4 fruitless searches.

5 MR. GIFFORD: The incentive of the officer
6 to be able to conduct a search when he doesn't otherwise
7 have probable cause is a powerful incentive. As the
8 Court has said, ferreting out crime is a competitive
9 enterprise. And also, these --

10 JUSTICE SCALIA: Willy-nilly. Officers just
11 like to search. They don't particularly want to search
12 where they're likely to find something. They just like
13 to search. So let's get dogs that, you know, smell
14 drugs when there are no drugs. You really think that
15 that's what's going on here?

16 MR. GIFFORD: Officers like to search so
17 that they can get probable cause so that they can
18 advance their career. Forfeiture is also an issue.

19 JUSTICE SCALIA: They like to search where
20 they're likely to find something, and that only exists
21 when the dog is well trained. It seems to me they have
22 every incentive to train the dog well.

23 MR. GIFFORD: But the question goes back to
24 the dog's reliability, what the officer knows
25 objectively, and what that officer can demonstrate on

1 the stand to the trial court to determine by the
2 totality of the circumstances that that dog is well
3 trained.

4 CHIEF JUSTICE ROBERTS: Getting back to --
5 I'm confused about the difference between must and is
6 required. What if the judge has before him or her a
7 record, this is where the dog went to school and it's a
8 bona fide school, this is where the dog was certified,
9 he's trained every -- every, you know, couple of weeks
10 or whatever it is, and the judge says, do you have any
11 field records, and the officer says, no, and the
12 drug says -- the judge says, well, then no probable
13 cause. That's reversible error, right?

14 MR. GIFFORD: It is reversible error if we
15 know what went into the training and certification. Was
16 that training and certification sufficient to prove the
17 dog was reliable? Did it include the use of blanks and
18 did the --

19 CHIEF JUSTICE ROBERTS: You have, I guess,
20 experts testify about whether -- what constitutes a good
21 training program.

22 MR. GIFFORD: No, not necessarily experts,
23 but simply the -- the officer who participated with the
24 dog can testify as to what he and the dog went through
25 to obtain the training certificate and the -- and the

1 certification.

2 JUSTICE SCALIA: Oh, I assure you that if we
3 agree with you there will be a whole body of experts
4 that will spring into being about dog training. I
5 assure you that that will be the case.

6 MR. GIFFORD: Those experts already exist.
7 They -- they are prevalent in the case law already.

8 JUSTICE SOTOMAYOR: I understood the Florida
9 supreme court, counselor, to say that the deficit in the
10 training records here was because there was no evidence
11 of false positives, that the reports didn't say, the
12 training reports didn't say, if the dog was alerting
13 falsely.

14 Assume that the record, as your adversary
15 claimed, shows the opposite, that a satisfactory
16 completion means that the dog detected drugs where they
17 were. What -- why wouldn't the training records here be
18 adequate in that circumstance?

19 MR. GIFFORD: That would be one of several
20 showings that would make the training records adequate.
21 Also, you would want to know whether there were
22 distractors used in the field. However, I don't believe
23 that the record supports, except -- and this is
24 arguable; the parties dispute this -- for the
25 maintenance training.

1 All the state had for the initial training
2 with Deputy Morris, not with Deputy Wheatley, was a
3 certificate: One certificate that said this dog was
4 trained by the Apopka Police Department for 120 hours
5 with Deputy Morris; another certificate saying that this
6 dog was certified by Drug Beat narcotics certifications,
7 again with Deputy Morris, for 1 year.

8 JUSTICE SOTOMAYOR: I -- I guess what I'm
9 asking you is, as a matter of law you want us to hold
10 that training records are inadequate unless what?
11 Unless -- you're going to specify now a list of things
12 they have to include?

13 MR. GIFFORD: No. This Court in -- in a
14 number of circumstances has provided examples that can
15 guide a court in probable cause determinations. In
16 Illinois v. Gates, under the old Aguilar-Spinelli test,
17 the Court specified where evidence on one prong can be
18 so strong that it substitutes for evidence on another
19 prong. In Ornelas, the Court pointed to local knowledge
20 that can be relied upon, such as the winter climate in
21 Milwaukee.

22 JUSTICE SCALIA: But, counsel, you're
23 defending a Florida supreme court opinion which says
24 "must." You can't just say, you know, I'm not asserting
25 any particular thing is necessary, just, you know,

1 totality of the circumstances. You have an opinion here
2 in which the Florida supreme court says "must." It must
3 include the, you know, the field training. Now, do --
4 do you disavow that or -- or do you want us the ignore
5 it? What?

6 MR. GIFFORD: That is -- that is not the
7 holding on which I'm relying here. The holding on which
8 I'm relying is that training and certification alone,
9 the mere fact of training and certification alone, is
10 not sufficient to establish the dog's reliability.

11 And as to the language about "must,"
12 remember, the Florida supreme court didn't just say that
13 the failure to produce one of these elements
14 necessitated reversal.

15 It then went and engaged in a totality of
16 the circumstances test. And several lower courts
17 applying that case, applying Harris, have reached the
18 same conclusion. In two of those cases --

19 JUSTICE SCALIA: But this is absent in the
20 totality of the circumstances and you nonetheless hold
21 that there was probable cause, then "must" does not mean
22 "must," right?

23 MR. GIFFORD: "Must" means "must" if the
24 state has the records. If the records exist, then the
25 state must produce them because it bears --

1 JUSTICE GINSBURG: That's not what the
2 Florida supreme court said? It listed, along with
3 training, that the -- the provision of records of field
4 performance.

5 MR. GIFFORD: I read that as: If those
6 records exist, the state must produce them, because not
7 only does it bear the burden of proof; it's the only
8 party that can produce these records because it keeps
9 the dog.

10 JUSTICE GINSBURG: Suppose it's -- it's a
11 dog that's just completed the training, training course,
12 top-performing dog in the training program, but there's
13 no field record.

14 MR. GIFFORD: If that -- if the training is
15 sufficient, if it has those elements that demonstrate
16 that the dog is reliable, those are the circumstances.
17 You have the totality of the circumstances there and
18 those circumstances don't include any field performance.
19 And, yes, under that circumstance, a trial court can
20 find the dog to be reliable.

21 JUSTICE ALITO: What is wrong with the
22 state's argument that field performance records are not
23 very probative because dogs detect odors, they don't
24 detect the physical presence of the substance that
25 created the odor, and therefore so-called false alerts,

1 cases in which a search was performed and no contraband
2 was found are not really cases of false alerts. What's
3 wrong with that?

4 MR. GIFFORD: Well, you don't know whether
5 they're cases of false alerts or not, because the state
6 will always point to the possibility of residual odor as
7 a reason. And we know from the studies that have been
8 cited in the briefs that there are other reasons that
9 dogs alert when that alert cannot be verified. Handler
10 cueing is identified as the chief one. And simply dogs
11 make mistakes. Dogs err. Dogs get excited and will
12 alert to things like tennis balls in trunks or animals,
13 that sort of thing.

14 JUSTICE ALITO: Well, that may all be true,
15 but then what -- what can one infer from the fact that a
16 dog alerted a number of times when no contraband was
17 found?

18 I think what you just said was the
19 explanation could be the dog detected an odor, but the
20 substance wasn't there, or it could be that the dog was
21 cued or the dog was confused or the dog is not very
22 competent. So what can one infer from these field
23 performance records?

24 MR. GIFFORD: Well, what you can infer is
25 this dog is not a very accurate indicator of probable

1 cause, because probable cause tests whether drugs are
2 likely to be found in a search that follows an alert.
3 If the dog's --

4 JUSTICE SCALIA: But they are likely to be
5 found if there is a residual odor of drugs, even though
6 the drugs are no longer there. So it's not an
7 incompetent dog when he alerts because of the residual
8 odor.

9 MR. GIFFORD: But if a dog has -- but if a
10 dog has previously alerted and no drugs have been found
11 because the dog's hyperacuity causes him to smell drugs
12 that were there two days or two weeks ago, then the next
13 time that dog alerts, it's less likely, the probability
14 declines that drugs will be found.

15 It goes to what probable cause measures,
16 rather than what the dog training and certification
17 community measure, and that is, the likelihood, the
18 reasonable probability, that drugs will be found
19 following the search.

20 JUSTICE SOTOMAYOR: Counsel, how is that any
21 different than a police officer who comes to a car and
22 smells marijuana? He's never going to know whether
23 there is any more in the car or not. It could have been
24 smoked up an hour before. I don't know how long
25 marijuana lingers for, but -- I'm not sure why residual

1 odor affects the reliability of the dog, which was
2 Justice Scalia's point. It's no different than an
3 officer who smells something.

4 He doesn't actually know whether it's
5 physically still present or not, but we're talking about
6 probabilities.

7 MR. GIFFORD: That's correct. And -- and
8 the difference is that -- that the police officer can
9 describe what he has smelled and can say, I smell
10 marijuana. All the dog tells the police officer is, I
11 smell something I was trained to detect, perhaps, if I'm
12 operating correctly.

13 But getting to this -- this issue of
14 residual odor, our position is that an alert where no
15 drugs are found means that the dog -- that -- it
16 detracts from probable cause in that instance.

17 But that's not the only rule available to
18 the court. Residual odor, whether an alert was to
19 residual odor and is therefore correct and accurate, is
20 something that can be litigated.

21 In one of the lower courts that decided the
22 case after the Florida supreme court, the court looked
23 to the field performance records, and it found several
24 of them well supported on the issue of whether the alert
25 was probably to the odor of drugs; several it didn't

1 find. So that is an issue that can be litigated.

2 Another possibility is --

3 JUSTICE ALITO: Well, excuse me.

4 Where -- when nothing is found, how can you tell whether
5 the dog alerted to a residual odor or simply made a
6 mistake?

7 Now, there may be cases where there is other
8 evidence that suggests that drugs were present in that
9 location, and, therefore, that is something from which
10 you can infer that the dog was alerting to residual
11 odor; but, the fact that you don't have evidence of that
12 doesn't mean that there wasn't residual odor.

13 MR. GIFFORD: No, it doesn't mean that there
14 wasn't residual odor. But, again, you go back to what
15 probable cause measures, I believe.

16 And the Florida supreme court didn't demand
17 evidence of residual odor. What it did is it said that
18 if field performance records exist, then the state can
19 explain unverified alerts in the field as residual odor,
20 and then a court can then evaluate that.

21 CHIEF JUSTICE ROBERTS: What's the magic
22 number? What percentage of accurate alerts or
23 inaccurate is enough for probable cause?

24 MR. GIFFORD: Well, this Court has always
25 hesitated to assign percentages to probable cause; but,

1 in the lower courts, once you get below 50 percent,
2 probable cause is much less likely to be found, assuming
3 that there is no other corroborative evidence, no other
4 reasonable suspicion factors.

5 I'd like to talk briefly about the Oregon
6 supreme court and what that court did in several cases.

7 Helzer and Foster decided in 2011,
8 independently of the Florida supreme court decision,
9 doesn't cite -- in Foster, the Oregon supreme court had
10 a dog that trained initially with the same handler,
11 unlike here, where the evidence was very strong as to
12 the features of the training and certification program,
13 and where that dog had, I believe, a 66 percent field
14 performance record.

15 Now, the court in Foster said that the dog's
16 reliability can be established by training,
17 certification, and performance in the field. The court
18 added that it didn't think that performance in the field
19 was the most reliable measure, but it's relevant, and
20 the court considered that 66 percent percentage.

21 But then, on the same day, in Helzer, there
22 was a dog that trained initially with a different
23 handler, that the handler ultimately testified to very
24 few details of the ongoing training and the
25 certification.

1 In Foster, the certification was with an
2 organization that required a 90 percent success rate.
3 In Helzer, there was no such testimony.

4 And this officer, like the officer here,
5 didn't keep field performance records when the dog
6 alerted and no drugs were found.

7 In Helzer, the court found that there was
8 insufficient evidence of reliability. And I believe
9 that those two cases demonstrate what is a -- what is a
10 correct line to draw in navigating what is reliable.

11 On several arguments made by the state, the
12 argument was that the maintenance training included
13 blanks, and that the dog did not alert to blanks. The
14 record, we believe, supports the Florida supreme court's
15 conclusion that blanks were tested -- the dog was tested
16 on blanks, but there was no testimony as to whether the
17 dog didn't alert on those blanks.

18 The state has said that the dog was
19 subsequently recertified. I don't find support in the
20 record for that. At a suppression hearing, the state
21 argued -- the officer testified that the dog was
22 scheduled for another certification, but we don't know
23 whether the dog was ever recertified.

24 The Court can affirm the Florida supreme
25 court simply on the failure to produce adequate

1 documentation of certification and initial training, and
2 on the fact that this dog was never certified with this
3 trainer -- with this handler and didn't initially work
4 with this handler.

5 You don't have a dog here who was reliable
6 enough to demonstrate probable cause. The Florida
7 supreme court so concluded. I believe its conclusion
8 was correct. And unless there are additional
9 questions...

10 JUSTICE GINSBURG: The alert -- the alert
11 here could have been to residual odor, or it could have
12 been to drugs inside the pickup truck. If it's --
13 because the alert was in front of the -- a front door
14 handle, is that -- so it -- it's equally likely that
15 it -- that it was just residual odor or that there were
16 drugs inside the pickup truck.

17 Can the police establish probable cause
18 when what the dog alerted to may well have been residual
19 odor and nothing inside? The dog didn't alert anyplace
20 other than the door handle, is that...

21 MR. GIFFORD: It can constitute probable
22 cause. What Officer Wheatley testified to in this case
23 was he believed that this alert was to residual odor
24 on the door handle --

25 JUSTICE KENNEDY: Excuse me. Did you say it

1 can or it can't?

2 MR. GIFFORD: It may. It may. It can
3 constitute probable cause in this case.

4 Officer Wheatley testified that this dog
5 alerted to the door handle. And in his prior
6 experience, when the dog alerts to the door handle, it
7 means that someone who had smoked or consumed drugs or
8 handled drugs had touched the door handle.

9 Now, if Officer Wheatley had testified that
10 in his experience when he'd seen such alerts and
11 conducted a search, drugs were found inside the vehicle,
12 then that residual odor alert would support probable
13 cause.

14 Officer Wheatley did not so testify. There
15 was insufficient evidence that this residual odor
16 alert -- that a residual odor alert of this nature,
17 without finding drugs afterward, supports probable
18 cause.

19 JUSTICE SCALIA: But at least we don't have
20 to worry about mothballs in this case; is that right?
21 There are no mothballs?

22 (Laughter.)

23 MR. GIFFORD: No. No mothballs to my
24 knowledge. No, Your Honor.

25 JUSTICE ALITO: Was that the holding in the

1 Florida supreme court, that there was no probable cause
2 because the dog alerted to the wrong part of the truck?

3 MR. GIFFORD: No, Your Honor.

4 JUSTICE ALITO: Was it any part of their
5 reasoning?

6 MR. GIFFORD: They were concerned about
7 residual odor alerting without any explanation by the
8 state as to how residual odor alerting supports probable
9 cause.

10 But the primary basis for its decision was
11 the lack of performance records and the lack of records
12 supporting initial training and certification to show
13 that this dog was reliable.

14 JUSTICE GINSBURG: And if we think they were
15 wrong in that respect, I suppose that you would say the
16 Court shouldn't reverse, but should vacate and remand
17 because the question did alert him to the door handle,
18 was that enough? Was that enough to establish probable
19 cause that there were drugs in the vehicle?

20 MR. GIFFORD: Well, I don't think the door
21 handle itself is -- is dispositive. I think it's the
22 door handle plus the lack of evidence that we have a
23 reliable dog.

24 And, again, the reason you need a reliable
25 dog, evidence on what training and certification means,

1 is that there are no standards, no standards whatsoever
2 for initial training.

3 Some states do have standards for training
4 and certification. Florida does not. And no standards
5 for -- for maintenance training as well.

6 In order to have probable cause, you have to
7 know what that certification, what that training means,
8 if you don't have standards that will tell that for you.

9 If there are no additional questions, I'll
10 conclude.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Garre, you have 3 minutes.

13 REBUTTAL ARGUMENT OF GREGORY G. GARRE

14 ON BEHALF OF THE PETITIONER

15 MR. GARRE: Thank you, Your Honor.

16 First, probable cause in this Court's
17 precedents looks not only to the likelihood that
18 contraband would be present, but the likelihood that
19 there would be evidence of a crime. And that would
20 include the so-called residual odor, evidence that drug
21 paraphernalia, someone had recently smoked illegal
22 narcotics in the vehicle, or the like.

23 So the alert to the so-called residual odor
24 of drugs is just as probative to the question of
25 probable cause as an alert to drugs themselves.

1 The fact that Aldo alerted to the door
2 handle area of the car doesn't negate in any way the
3 probable cause that Officer Wheetley had to search.
4 What it means is that the door handle area was where the
5 scent of the illegal narcotics was the strongest. It
6 could have been narcotics coming out of that area, or
7 coming out of the door seam, or could have been the fact
8 that someone who had used narcotics was using the door
9 handle to get in and out of the car.

10 Second, courts can determine reliability in
11 this context. They would look to the performance in the
12 controlled training environment. There is a real danger
13 with suggesting that field performance records are --
14 are a permissible foray for defendants in suppression
15 hearings to challenge the reliability of dogs because,
16 one, as Justice Alito pointed out, it's not a controlled
17 setting.

18 We don't know whether the dog did alert to
19 residual odors of narcotics that had been in the car,
20 drugs that were hidden and simply not found during
21 the relatively --

22 JUSTICE SCALIA: Would you -- would you
23 allow counsel to ask about that?

24 MR. GARRE: I think they could ask about it,
25 Your Honor. I don't think they could demand the

1 performance records themselves. And that would be a
2 huge deterrent to law enforcement, even maintaining
3 those records.

4 Third, Officer Wheetley and Aldo did train
5 together for nearly a year before the search in
6 question. They did complete the 40-hour drug detection
7 seminar at the Dothan, Alabama, police department. And
8 that certificate's at page 105 of the record.

9 And second, as Justice Scalia pointed out,
10 all the incentives in this area are aligned with
11 ensuring the reliability of drug detection dogs. It's
12 not in the police interest to have a dog that is
13 inaccurate in finding contraband or that is inaccurate
14 and putting an officer in harm's way.

15 Humans have relied upon dogs for law
16 enforcement-related purposes, due to their extraordinary
17 sense of smell, for centuries. Dogs, trained drug
18 detection dogs and explosive detection dogs, are
19 invaluable members of the law enforcement community
20 today.

21 We would ask the Court to reverse the
22 decision below, which would act as a serious detriment
23 to the use of that valuable tool.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. GARRE: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: The case is
2 submitted.

3 (Whereupon, at 12:01 p.m., the case in the
4 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>ability 19:3 26:25</p> <p>able 17:23 35:6</p> <p>above-entitled 1:11 53:4</p> <p>absent 39:19</p> <p>absolute 10:5</p> <p>Absolutely 10:22</p> <p>accept 8:9,10</p> <p>accurate 14:13 18:15 41:25 43:19 44:22</p> <p>accurately 14:14 18:4,5 20:25</p> <p>acquire 34:15 34:20</p> <p>act 52:22</p> <p>actual 6:11</p> <p>added 45:18</p> <p>addition 31:15</p> <p>additional 47:8 50:9</p> <p>address 14:2</p> <p>addressing 20:11</p> <p>adequate 7:5,14 7:23 8:8,9,23 37:18,20 46:25</p> <p>admitted 14:11</p> <p>advance 35:18</p> <p>adversary 37:14</p> <p>affirm 46:24</p> <p>affirmative 22:16</p> <p>afterward 48:17</p> <p>age 14:24</p> <p>agencies 15:7,8 15:9</p> <p>ago 42:12</p> <p>agree 11:25 21:24 29:19 37:3</p> <p>Aguilar-Spinelli 38:16</p>	<p>airplanes 26:15</p> <p>Alabama 5:1 6:12 12:14 52:7</p> <p>Aldo 4:22 11:17 12:14,16 22:3 32:19,20 34:6 51:1 52:4</p> <p>Aldo's 5:6</p> <p>alert 3:10 13:5 18:4,13,16 19:13,15,22,23 20:11 22:18 24:5 41:9,9,12 42:2 43:14,18 43:24 46:13,17 47:10,10,13,19 47:23 48:12,16 48:16 49:17 50:23,25 51:18</p> <p>alerted 13:10 18:5 41:16 42:10 44:5 46:6 47:18 48:5 49:2 51:1</p> <p>alerting 13:13 14:14 37:12 44:10 49:7,8</p> <p>alerts 13:22 14:6 14:13 16:5,8 18:11 19:11,12 24:5 25:9 40:25 41:2,5 42:7,13 44:19 44:22 48:6,10</p> <p>aligned 52:10</p> <p>Alito 40:21 41:14 44:3 48:25 49:4 51:16</p> <p>allow 25:25 51:23</p> <p>allowed 31:7</p> <p>Amendment 5:14 12:3 13:18 31:25</p> <p>amicus 1:19 2:7</p>	<p>14:9 18:24</p> <p>amounts 4:4</p> <p>animals 41:12</p> <p>announce 8:21</p> <p>announced 10:4</p> <p>annual 5:15</p> <p>answer 14:16 24:1,2,13 27:18</p> <p>answered 3:17</p> <p>anybody's 16:6</p> <p>anyplace 47:19</p> <p>apartments 19:12</p> <p>Apopka 4:24 9:22 38:4</p> <p>appeals 3:23</p> <p>APPEARAN... 1:14</p> <p>appellate 25:6</p> <p>Appendix 11:20</p> <p>applies 32:8</p> <p>applying 39:17 39:17</p> <p>approach 6:14 27:10</p> <p>approaches 25:18</p> <p>appropriate 8:2 21:25 24:1</p> <p>area 10:12 15:13 21:25 32:23 51:2,4,6 52:10</p> <p>arguable 37:24</p> <p>argue 17:22</p> <p>argued 17:11 46:21</p> <p>argument 1:12 2:2,5,9,12 3:5 15:22 16:1 17:12,23 18:23 28:7 40:22 46:12 50:13</p> <p>arguments 46:11</p> <p>arrest 21:18,21 21:22 28:3</p>	<p>articles 17:4</p> <p>aside 32:15</p> <p>asked 20:19 26:4</p> <p>asking 7:9 8:13 8:21 38:9</p> <p>aspect 15:6 23:7</p> <p>aspects 6:3</p> <p>asserting 38:24</p> <p>assign 44:25</p> <p>Assistant 1:17 1:21</p> <p>Assume 37:14</p> <p>assuming 7:8 19:9 23:12 45:2</p> <p>assure 37:2,5</p> <p>attorney 28:21</p> <p>Australian 13:9</p> <p>authentic 6:10</p> <p>available 12:23 15:1 34:17 43:17</p> <p>average 4:4 24:8 24:8,17</p> <p>a.m 1:13 3:2</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 3:4 6:24 10:19 18:2 21:21 24:15 25:5 35:23 36:4 44:14</p> <p>balls 41:12</p> <p>based 13:5 14:15 22:18</p> <p>basically 24:25 25:12,18</p> <p>basis 20:18 23:20 28:2 49:10</p> <p>bats 24:9</p> <p>batting 4:4 24:8 24:8,17</p> <p>bear 40:7</p> <p>bears 28:14 31:17 39:25</p>	<p>Beat 38:6</p> <p>behalf 1:15,22 2:4,11,14 3:6 28:8 50:14</p> <p>believe 19:15 30:2,3 37:22 44:15 45:13 46:8,14 47:7</p> <p>believed 47:23</p> <p>believes 7:23 26:22 30:5</p> <p>best 12:20</p> <p>bit 19:9</p> <p>blanks 36:17 46:13,13,15,16 46:17</p> <p>board 27:1</p> <p>body 25:3 37:3</p> <p>bomb 27:4</p> <p>bombs 26:14,15 27:15</p> <p>bona 4:17 9:7 20:20 36:8</p> <p>BREYER 29:4 29:18 30:4,13</p> <p>brief 8:6 27:8</p> <p>briefly 45:5</p> <p>briefs 14:9 41:8</p> <p>bring 8:5 33:8,8</p> <p>buildings 26:14</p> <p>burden 23:20 29:16 40:7</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1</p> <p>calculate 24:16</p> <p>calculated 24:9</p> <p>call 16:14,19</p> <p>canine 28:11</p> <p>captured 11:11</p> <p>car 18:14,15,17 42:21,23 51:2 51:9,19</p> <p>care 35:2</p> <p>career 35:18</p> <p>cares 35:3</p> <p>cars 5:4,7 13:5</p>
--	---	---	--	---

<p>case 3:9 4:22 5:17 10:4,13 11:10,20 14:4 15:1 16:1,4,7 17:10 18:1,4,4 18:15 19:8,19 21:21 22:16 25:3,16,17 28:3 29:8 32:22 33:16,17 33:20 37:5,7 39:17 43:22 47:22 48:3,20 53:1,3 cases 3:25 14:10 16:11 22:25 24:10 39:18 41:1,2,5 44:7 45:6 46:9 cause 3:11,25 4:1 8:24 10:8 11:1 13:19 19:13,17 20:1 22:17 23:4 25:8 28:12 32:11 34:16,21 35:7,17 36:13 38:15 39:21 42:1,1,15 43:16 44:15,23 44:25 45:2 47:6,17,22 48:3,13,18 49:1,9,19 50:6 50:16,25 51:3 causes 42:11 central 7:15 11:22 15:21 18:10 centuries 52:17 certain 9:18 14:24 17:5 certainly 6:9 23:19 35:2 certainty 20:4 certificate 32:16 32:18,19,19</p>	<p>36:25 38:3,3,5 certificate's 52:8 certification 5:11,15 6:20 6:20 7:2,10,13 9:8,12,14 11:3 11:6,15 12:3,6 21:10 28:17 31:2 32:15 36:15,16 37:1 39:8,9 42:16 45:12,17,25 46:1,22 47:1 49:12,25 50:4 50:7 certifications 32:23,23,24 38:6 certified 11:24 22:4 32:21 33:6 36:8 38:6 47:2 certify 34:13 cetera 19:21,21 challenge 3:20 17:25 18:1 51:15 challenges 15:6 chance 4:2 chasing 27:22 chief 3:3 18:20 18:22 19:1 21:24 22:2,8 26:24 27:13 28:5,9 36:4,19 41:10 44:21 50:11 52:24 53:1 chooses 3:20 27:19 Circuit 25:17 circumstance 10:5 37:18 40:19 circumstances 7:24 10:3</p>	<p>28:12 29:21 36:2 38:14 39:1,16,20 40:16,17,18 cite 27:8 45:9 cited 41:8 claimed 37:15 classes 10:20 CLAYTON 1:6 clear 10:14 clearly 4:22 8:12 climate 38:20 close 9:3,5 32:11 come 14:9 16:4 16:7 comes 16:2,12 25:20 28:15 42:21 coming 51:6,7 community 42:17 52:19 competent 41:22 competitive 35:8 complete 52:6 completed 4:17 9:6,21 11:23 14:22 40:11 completion 5:24 37:16 conceding 31:22 conceive 3:25 conception 13:19 concern 24:14 concerned 28:22 49:6 concerns 30:8 conclude 50:10 concluded 47:7 conclusion 39:18 46:15 47:7 conduct 28:12 35:6 conducted 6:11</p>	<p>21:15 48:11 confidence 25:19 confused 36:5 41:21 consideration 32:13 considered 45:20 consisted 5:3 consistent 29:16 consistently 13:4 constitute 47:21 48:3 constitutes 36:20 Constitution 29:25 30:3,5 constitutional 33:1 constitutional... 24:20 26:6 consumed 48:7 contained 5:4 content 7:10,11 context 23:8 51:11 continuous 5:1 continuously 4:4 5:18,18 contours 8:3,5 contraband 4:3 12:23 15:11 41:1,16 50:18 52:13 contracted 6:18 control 29:20 controlled 13:10 20:18,24 21:16 21:19 23:9 24:15 51:12,16 converting 4:1 conviction 32:11 coon 27:21 correct 7:2,5,24 12:11 23:3</p>	<p>33:13 43:7,19 46:10 47:8 correctly 13:10 43:12 corroborative 45:3 counsel 13:7 18:20 19:7 28:5 33:7,8 38:22 42:20 50:11 51:23 52:24 counselor 37:9 count 33:2 country 15:7,17 County 32:20 34:8 couple 22:12 36:9 course 11:18 12:12,13 14:5 17:23 20:1,15 29:19 40:11 courses 10:25 court 1:1,12 3:8 3:16,23 4:1 6:2 6:12 7:1 8:3,14 10:1,13,18 13:9,18 14:19 15:10,23 16:20 19:2,3 20:6,14 21:6 22:13 23:11,25 24:8 24:25 25:11,11 25:18 28:10,21 29:3,7,10,14 30:4,10,20 31:3,5,6,10,16 31:23 32:8,9 32:12 35:8 36:1 37:9 38:13,15,17,19 38:23 39:2,12 40:2,19 43:18 43:22,22 44:16 44:20,24 45:6 45:6,8,9,15,17</p>
--	--	--	---	---

45:20 46:7,24 46:25 47:7 49:1,16 52:21 courts 6:3 25:4 25:6,6,12,15 25:19 26:6,23 28:16 39:16 43:21 45:1 51:10 court's 3:23,24 18:10 24:13 46:14 50:16 created 40:25 crime 4:3 35:8 50:19 criminal 16:13 17:7 criminally 16:10 critical 13:13 19:5 23:7 26:5 26:10 criticize 23:11 cross-trained 27:12 cued 17:11,22 41:21 cueing 17:6,10 17:14,21 18:1 41:10 cues 17:17 curiae 1:19 2:7 18:24 cut 16:20	45:7 decision 3:24 18:11 45:8 49:10 52:22 declines 42:14 deeply 13:21 defendant 3:20 16:13,17,19 17:7 22:21 23:13,15,16,24 25:25 defendants 17:22 51:14 Defender 1:21 defending 38:23 deficit 37:9 defines 7:5 delve 6:3 8:3 delves 16:23 demand 10:24 44:16 51:25 demanded 20:6 demonstrate 35:25 40:15 46:9 47:6 demonstrated 25:21 denominator 24:12 department 1:18 4:24,25 8:8 9:13,23,24 12:15 34:11,14 35:2 38:4 52:7 departments 6:11,18,23 department's 8:23 depended 10:17 deputy 32:20 34:8 38:2,2,5,7 describe 43:9 despite 19:22 detail 28:2 29:2 details 16:24 45:24 detect 19:4	20:23 40:23,24 43:11 detected 37:16 41:19 detecting 11:8 27:3 detection 3:10 4:3 9:22 12:10 12:13 15:10 25:4,9,9 27:7 27:11 52:6,11 52:18,18 detector 28:14 determination 8:23 23:3 determinations 38:15 determine 7:17 7:23 13:15 20:16 36:1 51:10 determines 13:12 determining 23:4 24:18 deterrent 52:2 detracts 43:16 detriment 52:22 deviated 31:14 didactic 29:12 difference 27:4 36:5 43:8 different 9:14 17:18,24 21:8 22:22 27:10 29:19,21,22 42:21 43:2 45:22 differently 6:15 difficulty 17:16 disagree 28:20 28:25 disagreed 29:5,5 disagrees 29:1 disavow 39:4 discipline 27:6 discovery 14:6	23:17 dispositive 49:21 dispute 37:24 distract 8:4 distracters 6:4 distractors 37:22 distrust 15:23 diversity 25:15 doctor 10:18,19 34:13 documentation 47:1 dog 3:13,19,21 4:12,17,19,22 5:10,13,18,21 6:15 7:17 8:22 9:6 11:7,17,23 11:24 12:16,16 13:3,5,10,22 14:19,22 16:2 16:5,8,13,14 16:15,16 17:1 17:11,12,22 18:3,4 19:11 19:16,22 20:22 20:23 21:10,15 21:19,23,23 22:18 24:5,5 24:18,22 25:9 25:20,22 26:1 26:6,8 27:2,3,6 27:11,18 28:22 31:3,17 32:15 32:21 33:1,3 33:11,18,23,25 34:4,11 35:21 35:22 36:2,7,8 36:17,24,24 37:4,12,16 38:3,6 40:9,11 40:12,16,20 41:16,19,20,21 41:21,25 42:7 42:9,10,13,16 43:1,10,15	44:5,10 45:10 45:13,22 46:5 46:13,15,17,18 46:21,23 47:2 47:5,18,19 48:4,6 49:2,13 49:23,25 51:18 52:12 dogs 4:5 7:19 12:10,20,22 14:6,14,17,17 14:23,24 15:1 15:7,10,16,24 17:17 19:4,5 19:23 25:4 26:11,12,14,15 26:16,23,25 27:7,11,14,21 27:24 35:13 40:23 41:9,10 41:11,11 51:15 52:11,15,17,18 52:18 dog's 3:10 13:12 18:12,13,15 23:8 28:14 31:7 35:24 39:10 42:3,11 45:15 doing 25:12 door 47:13,20 47:24 48:5,6,8 49:17,20,22 51:1,4,7,8 Dothan 5:1 9:23 12:14 52:7 draw 46:10 drug 3:10 12:9 25:4 27:11 36:12 38:6 50:20 52:6,11 52:17 drugs 4:21 5:8 11:8 14:6,11 14:12 18:8 19:12 24:6 28:15 35:14,14
D				
D 3:1 da 29:7,7,7,7,7 danger 51:12 dangerous 13:2 date 32:18 day 19:5 23:5 45:21 days 21:17 28:3 42:12 death 19:5 26:10 decide 7:13 decided 43:21				

<p>37:16 42:1,5,6 42:10,11,14,18 43:15,25 44:8 46:6 47:12,16 48:7,8,11,17 49:19 50:24,25 51:20 due 52:16 D.C 1:8,15,18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 19:8,19 effect 3:19 effectively 34:1 eight 5:7 either 27:6 elements 29:3 39:13 40:15 encompass 28:16 encounters 13:2 ends 16:10 enforcement 6:21 15:7,8,9 20:17 23:21 25:7,20 52:2 52:19 enforcement-r... 52:16 engaged 39:15 ensure 12:21 ensuring 52:11 enterprise 35:9 entities 6:17,21 environment 51:12 equally 47:14 erecting 3:17 err 41:11 error 36:13,14 errors 21:16 especially 20:12 ESQ 1:15,17,21 2:3,6,10,13 establish 3:11 5:21 9:14 11:7</p>	<p>19:16 20:19 22:17 25:8 32:3 39:10 47:17 49:18 established 21:1 34:5,6,7 45:16 establishes 8:24 10:7 establishing 11:21 25:1 et 19:21,21 evaluate 12:20 44:20 evaluated 5:19 evidence 4:3 8:15 10:18,23 11:13,16 15:11 15:11 23:12,13 28:16 30:24 31:1,7,17 33:11,14,19,19 37:10 38:17,18 44:8,11,17 45:3,11 46:8 48:15 49:22,25 50:19,20 evidentiary 3:18 22:14 25:2 examine 10:19 example 17:5 examples 38:14 exception 28:11 excited 41:11 excuse 44:3 47:25 exercises 21:14 exist 29:15 30:9 31:20 32:7 33:20 37:6 39:24 40:6 44:18 exists 12:24 35:20 expect 7:9,12 experience 15:14,15,20 48:6,10</p>	<p>expert 26:7 experts 36:20,22 37:3,6 expired 5:11 explain 44:19 explains 27:8 explanation 41:19 49:7 explosive 52:18 explosives 15:12 27:12 extraordinary 3:18 52:16</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 8:11 13:2 facilities 6:17 fact 5:18 11:16 19:22 28:14 30:23 32:15 33:17 39:9 41:15 44:11 47:2 51:1,7 factor 10:10 factors 11:11 45:4 facts 32:9 failure 13:13 39:13 46:25 fair 4:2 20:3 22:21 fallen 14:20 false 20:24,25 37:11 40:25 41:2,5 falsely 37:13 far 16:24 Farther 30:10 features 45:12 Federal 15:8 26:13,13,14 FEMA 26:15 ferreting 35:8 fide 4:17 9:7 20:20 36:8 field 4:9 10:2 12:24 23:12,17</p>	<p>23:25 24:2,4 26:17 28:18,25 30:16,20,23 31:24 32:2,10 32:13 36:11 37:22 39:3 40:3,13,18,22 41:22 43:23 44:18,19 45:13 45:17,18 46:5 51:13 find 26:16 35:12 35:20 40:20 44:1 46:19 finding 48:17 52:13 fine 33:7 finish 7:7 first 17:10 29:11 29:22 34:2 50:16 fixed 13:23 flat 10:6 flaw 20:5 Florida 1:3,22 3:16 4:24 6:2 6:12 7:1 9:22 18:10 20:5 21:5 22:13 23:11 24:7,13 24:25 25:10 29:6,9,13 30:20 31:6,16 31:23 37:8 38:23 39:2,12 40:2 43:22 44:16 45:8 46:14,24 47:6 49:1 50:4 focus 24:17 30:25 following 42:19 follows 42:2 foray 51:14 Forfeiture 35:18 formal 11:15 21:9,10,11,14</p>	<p>former 6:21 forth 10:21 Foster 45:7,9,15 46:1 found 16:9 18:8 41:2,17 42:2,5 42:10,14,18 43:15,23 44:4 45:2 46:6,7 48:11 51:20 Fourth 5:14 12:3 13:18 31:25 fraction 24:11 friends 6:1 front 47:13,13 fruitless 35:4 fundamental 20:5 fundamentally 3:22 22:18</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 1:15 2:3,13 3:1,5 50:13 game 22:21 Garre 1:15 2:3 2:13 3:3,5,7,14 3:16 4:7,15 5:12,23 6:9,19 7:3,6,15 8:1,10 8:16 9:3,5,12 10:9,12,22 11:2,9 12:2,8 12:11 13:17 14:1,21 15:25 16:18 17:2,9 17:20 18:9,21 25:23 26:5,9 50:12,13,15 51:24 52:25 Gates 38:16 general 1:18 25:14 27:9,10 28:20 generally 25:22 getting 36:4</p>
--	--	--	--	--

<p>43:13 Gifford 1:21 2:10 28:6,7,9 28:24 29:9 30:2,6,22 31:8 31:10,13,19 32:1,6 33:4,13 33:17 34:2,15 34:19,24 35:5 35:16,23 36:14 36:22 37:6,19 38:13 39:6,23 40:5,14 41:4 41:24 42:9 43:7 44:13,24 47:21 48:2,23 49:3,6,20 GINSBURG 4:8 5:9,20 6:6 11:2 11:25 12:6,9 23:10 30:14 31:22 32:4 33:22 40:1,10 47:10 49:14 Ginsburg's 6:25 give 24:1 given 10:18 glance 29:12 GLEN 1:21 2:10 28:7 go 6:24 10:19 14:23 18:2 22:5 24:14 29:23 32:7 34:21 44:14 goes 4:8 35:23 42:15 going 4:19 12:19 13:3 15:3 16:4 16:7 21:21 24:3,3 25:5 27:3 29:23 35:15 38:11 42:22 good 5:6 27:2,3 27:14,15,16 34:18,19 36:20</p>	<p>Gorsuch's 25:16 gotten 12:13 government 16:2,12 22:16 22:20 26:9,21 28:20,24 29:1 32:5,6 government's 22:15 great 28:1 GREGORY 1:15 2:3,13 3:5 50:13 Group 27:7 grow 14:17 guess 36:19 38:8 guide 38:15</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>handle 47:14,20 47:24 48:5,6,8 49:17,21,22 51:2,4,9 handled 48:8 handler 4:11 9:9 9:17 12:1,1,7 16:3,14,19 17:6 21:11,15 22:22 23:24,24 25:25 33:25 41:9 45:10,23 45:23 47:3,4 handlers 12:4 12:19 handler's 9:9 happens 14:17 23:5 harm's 12:25 52:14 Harris 1:6 39:17 Harvard 10:20 hear 7:1 hearing 3:19 17:21 30:25 33:8,10 46:20 hearings 51:15 held 30:24 31:5</p>	<p>helpful 24:4 Helzer 45:7,21 46:3,7 heroin 27:3 hesitated 44:25 hidden 51:20 history 15:15 hit 24:10,16 hold 8:14 26:7 38:9 39:20 holding 39:7,7 48:25 home 20:12 homeland 19:5 Honor 3:7,14 4:15 5:12,23 6:10,19 8:1,11 10:9 11:9 12:2 14:2 16:18 17:10 20:19 21:8 23:7 28:4 48:24 49:3 50:15 51:25 52:25 hour 42:24 hours 9:22,23 12:15 38:4 houses 19:12 huge 52:2 humans 14:24 52:15 Hurricane 26:19 hurricanes 26:16 hyperacuity 42:11</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>identified 21:17 41:10 ignore 39:4 illegal 18:5 50:21 51:5 Illinois 38:16 impaired 14:25 importance</p>	<p>10:14 important 5:17 5:24 20:15,21 21:13 24:24 27:20,24 impose 5:15 23:21 imposed 25:7 imposing 22:13 improper 4:13 inaccurate 44:23 52:13,13 inadequate 38:10 incentive 12:21 34:13,15 35:5 35:7,22 incentives 34:10 52:10 include 14:12 36:17 38:12 39:3 40:18 50:20 included 46:12 including 4:20 11:12 21:17 28:3 incompetent 34:11,13 42:7 independently 45:8 indicative 18:12 indicator 33:4 41:25 individual 19:20 32:24 34:25 individuals 14:10 infallibility 20:6 20:7 infallible 4:5 infer 41:15,22 41:24 44:10 inflexible 22:14 25:1 information 19:19 23:14</p>	<p>inherently 17:12 initial 27:25 28:16 31:1 32:14 38:1 47:1 49:12 50:2 initially 20:18 45:10,22 47:3 innocent 34:25 inquire 4:16 17:21 inquired 29:2 inquiry 7:16 21:25 inside 47:12,16 47:19 48:11 insist 10:1 instance 43:16 institutional 26:22 insufficient 46:8 48:15 intentionality 17:15 interest 52:12 interests 26:10 26:10 introduce 22:17 invaded 34:24 invalid 31:9 invaluable 52:19 issue 35:18 43:13,24 44:1</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JA 21:18 Jersey 26:18 Joint 11:19 Jones 25:17 JOSEPH 1:17 2:6 18:23 judge 7:9,13,16 7:22,23 8:7 9:1 9:10,21 13:15 22:2,4,6 23:3 25:16 29:20</p>
---	--	---	---	---

<p>33:9 36:6,10 36:12 judges 22:24 26:13 June 21:18 Justice 1:18 3:3 3:12,15 4:7,8 5:9,20 6:6,16 6:24,25 7:4,7 7:21 8:7,16 9:4 9:8,25 10:10 10:16 11:2,25 12:6,9 13:7,21 14:16 15:25 16:25 17:3,14 18:6,20,22 19:1,7,18 20:2 20:10 21:2,5 21:24 22:2,8 22:24 23:10 25:10,24 26:24 27:13,21 28:5 28:9,19 29:4 29:18 30:4,13 30:14 31:4,9 31:12,18,22 32:4,25 33:7 33:15,21,22 34:9,18,20 35:1,10,19 36:4,19 37:2,8 38:8,22 39:19 40:1,10,21 41:14 42:4,20 43:2 44:3,21 47:10,25 48:19 48:25 49:4,14 50:11 51:16,22 52:9,24 53:1 justified 23:22 justify 29:16</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN 15:25 16:25 17:3,14 18:6 25:10,24 keep 26:14,15</p>	<p>30:11,15,15,19 30:22 46:5 keeps 40:8 KENNEDY 22:24 28:19 47:25 kind 17:5 23:20 27:18 kinds 22:7 25:7 27:11 know 8:5 9:1 10:16,20 12:20 15:19,20 16:11 17:4 21:6,7 24:9,10,11,15 27:13,17 29:21 35:13 36:9,15 37:21 38:24,25 39:3 41:4,7 42:22,24 43:4 46:22 50:7 51:18 knowledge 38:19 48:24 knows 35:24 K-9 26:17</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 30:24 32:13 32:14 49:11,11 49:22 Lago 10:13 language 39:11 lapse 5:12 large 25:3 Laughter 48:22 law 6:21 15:7,8 15:9 19:6 20:17 23:21 25:3,7,19 32:9 37:7 38:9 52:2 52:15,19 leads 17:8 learned 17:16 led 17:6 legal 8:20,21 19:10</p>	<p>let's 35:13 level 15:8 26:22 29:2 34:4,5,7 life 19:5 26:10 likelihood 42:17 50:17,18 likewise 15:12 limit 11:12 line 46:10 lingering 18:13 lingers 42:25 list 29:8,25 30:1 38:11 listed 40:2 listing 31:15 litigated 43:20 44:1 little 19:9 local 38:19 locating 11:5 location 44:9 logic 15:14,15 long 19:3 42:24 longer 42:6 look 10:2 25:16 27:7 33:19 51:11 looked 43:22 looking 14:21,25 26:18 looks 29:12 50:17 loses 30:17 lot 17:6 34:23 lower 25:4 39:16 43:21 45:1 Ludwig 25:16</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>magic 44:21 maintain 34:3 maintaining 52:2 maintenance 28:17 31:2 34:3 37:25 46:12 50:5</p>	<p>major 27:19 marijuana 42:22,25 43:10 Marshals 26:12 Massachusetts 25:11 material 24:3 matter 1:11 29:19 38:9 53:4 matters 24:21 29:22 mean 6:1 18:6 29:25 30:17 34:20 39:21 44:12,13 means 21:6,8 33:18 37:16 39:23 43:15 48:7 49:25 50:7 51:4 meant 5:7 11:11 18:7 measure 24:23 42:17 45:19 measured 7:12 21:1 measures 42:15 44:15 medical 10:18 10:20 34:12 meet 27:24 members 52:19 mentioned 10:13 mere 39:9 meth 27:16 methampheta... 18:14,16 method 16:22 17:5,8 methodologies 24:21 26:7 27:9 methods 8:4 16:15 Milwaukee</p>	<p>38:21 mini 26:7 minutes 50:12 misconceives 3:24 misplaced 22:19 mistake 44:6 mistakes 41:11 money 26:21 monitor 14:19 monitored 13:16 months 5:11 21:21,22 32:18 33:23 Morris 38:2,5,7 mothballs 48:20 48:21,23 motion 23:14 motorist 34:25 mouth 26:21</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narcotics 9:22 11:5 12:13 16:5,8,9 18:5 20:23,24 38:6 50:22 51:5,6,8 51:19 national 7:2,4,8 nature 48:16 navigating 46:10 nearly 52:5 necessarily 36:22 necessary 38:25 necessitated 39:14 need 33:19 49:24 needs 24:17 negate 51:2 negatives 20:25 nervous 19:21 never 16:4 32:21</p>
--	---	---	--	--

<p>33:10 42:22 47:2 New 26:18,18 notion 18:11 number 13:14 13:14,18,23,24 14:13 23:1 24:9 38:14 41:16 44:22 numerator 24:12 numerical 13:19</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 objectively 35:25 obligations 22:15 obtain 36:25 October 1:9 odor 18:5,13 20:23,24 24:6 40:25 41:6,19 42:5,8 43:1,14 43:18,19,25 44:5,11,12,14 44:17,19 47:11 47:15,19,23 48:12,15,16 49:7,8 50:20 50:23 odors 18:12 19:4 40:23 51:19 officer 5:5 10:23 10:24 12:11,16 13:4 19:20 21:3 32:22 33:3,23 35:5 35:24,25 36:11 36:23 42:21 43:3,8,10 46:4 46:4,21 47:22 48:4,9,14 51:3 52:4,14 officers 6:22 10:15 13:2</p>	<p>34:22 35:3,10 35:16 Oh 37:2 okay 4:16 old 14:17,24 38:16 once 22:21 27:18 45:1 ongoing 20:18 21:14 28:2 45:24 operated 6:21 operating 43:12 opinion 25:16 29:10 30:10 32:8 38:23 39:1 opposite 37:15 oral 1:11 2:2,5,9 3:5 18:23 28:7 order 50:6 ordinarily 6:12 Oregon 45:5,9 organization 9:7 46:2 Ornelas 38:19 outcome 20:22 outline 32:4 outside 20:12</p> <hr/> <p style="text-align: center;">P</p> <p>P 1:21 2:10 3:1 28:7 page 2:2 15:14 15:14 52:8 pages 11:20 Palmore 1:17 2:6 18:22,23 19:1,15,25 20:3,14 21:4,7 22:1,6,11 23:6 23:10,19 25:14 26:3 27:5,17 27:23 paraphernalia 50:21 part 5:2 14:8</p>	<p>17:10 22:15 32:8,21 49:2,4 participated 36:23 particular 13:1 20:12 38:25 particularly 13:9 35:11 parties 37:24 party 40:8 pass 27:25 passages 29:10 passed 21:23 people 15:18 percent 13:11 13:22 14:7,10 14:14,14 19:23 19:25 45:1,13 45:20 46:2 percentage 44:22 45:20 percentages 44:25 perfectly 21:19 perform 15:2,3 19:5 performance 4:9 5:6 10:2 23:8,12,17,25 24:3 28:18,25 30:8,12,15,16 30:19,20,23 31:24 32:2,10 32:13 40:4,18 40:22 41:23 43:23 44:18 45:14,17,18 46:5 49:11 51:11,13 52:1 performed 11:17 21:3,17 21:19 26:1 41:1 performing 7:17 periods 33:24 permissible 23:16 51:14</p>	<p>permutations 23:2 person 16:10 Petitioner 1:4 1:16,20 2:4,8 2:14 3:6 18:25 50:14 physical 40:24 physically 43:5 pickup 47:12,16 play-reward 16:22 please 3:8 19:2 28:10 plus 49:22 point 16:6,14 20:21 24:21,25 27:20,24 29:24 41:6 43:2 pointed 26:6 38:19 51:16 52:9 police 4:24,25 6:11,18,23 8:8 8:23 9:13,23 9:23 10:14 11:13,18 12:14 13:2 19:13,20 23:5 34:10,14 34:22 35:1,3 38:4 42:21 43:8,10 47:17 52:7,12 policeman 33:12 33:18 position 5:14 12:20 13:4 17:20 19:9 28:20 43:14 positives 20:25 37:11 possibility 41:6 44:2 powerful 35:7 precedents 50:17 predicting 13:6</p>	<p>predictors 15:11 premises 18:3 preparing 23:13 presence 13:6 15:12 18:16 28:15 40:24 present 30:11 43:5 44:8 50:18 presented 13:8 22:3 presume 6:13 prevalent 37:7 previously 34:4 42:10 primarily 14:21 primary 14:4,15 49:10 principal 20:5 22:12 printing 6:5 prior 48:5 privacy 34:25 private 6:17,20 probabilities 43:6 probability 4:2 13:25 20:3 42:13,18 probable 3:11 3:25 4:1 8:24 10:7 11:1 13:19 19:13,16 20:1 22:17 25:8 28:12 32:10 34:16,21 35:7,17 36:12 38:15 39:21 41:25 42:1,15 43:16 44:15,23 44:25 45:2 47:6,17,21 48:3,12,17 49:1,8,18 50:6 50:16,25 51:3 probably 11:10 43:25</p>
--	---	---	--	---

<p>probative 40:23 50:24 problem 3:22 8:17,18 17:19 18:10 24:4 problematic 15:5 17:8 problems 15:21 proceed 23:5 process 7:10,11 24:20 produce 29:11 29:15 31:6 32:7 39:13,25 40:6,8 46:25 produced 31:16 31:21 proficiency 4:20 5:25 7:18 8:22 8:24 11:4 21:14 25:21 27:25 28:2 34:4,5,7 proficient 20:22 program 4:11 4:18,19,23 6:7 11:3,16 26:9 27:25 36:21 40:12 45:12 programs 6:10 prong 38:17,19 proof 29:16 40:7 proper 23:15 proposing 10:6 prosecuted 16:10 protect 15:10 26:12 Protective 26:13 prove 32:5 36:16 provided 38:14 provides 10:23 providing 31:1 provision 40:3 proximity 14:11 Public 1:21</p>	<p>purposes 52:16 purview 28:15 put 9:17 12:25 26:21 puts 3:19 13:18 putting 13:4 52:14 p.m 53:3</p> <hr/> <p style="text-align: center;">Q</p> <p>question 3:9,17 6:25 7:8 18:3 20:11,15 22:11 22:20,22 23:2 23:23 24:14 25:25 35:23 49:17 50:24 52:6 questioning 9:9 questions 7:9 9:19 16:20,21 16:25 19:8 22:7,21 26:3 47:9 50:9 quite 8:19 21:17 26:23</p> <hr/> <p style="text-align: center;">R</p> <p>R 1:17 2:6 3:1 18:23 rate 46:2 reach 14:24 reached 13:13 39:17 read 7:1 40:5 reading 17:16 real 15:4 51:12 really 5:6 6:3 17:3 22:9 28:22 35:14 41:2 reason 6:14 14:18 15:18 24:19 41:7 49:24 reasonable 42:18 45:4 reasonableness</p>	<p>10:17 reasoning 49:5 reasons 22:19 30:11 41:8 rebuttal 2:12 18:19 50:13 received 4:23,24 recertified 5:10 5:13 46:19,23 recipe 31:14,19 recognized 19:3 record 8:11,12 8:14,17,17 9:15,20 21:1 22:10 28:1 36:7 37:14,23 40:13 45:14 46:14,20 52:8 records 10:2 11:19,19 15:1 21:20 23:18 29:14 30:8,8 30:12,16,19,21 30:23 31:15,20 31:24 32:2,7 32:10,13,14 36:11 37:10,17 37:20 38:10 39:24,24 40:3 40:6,8,22 41:23 43:23 44:18 46:5 49:11,11 51:13 52:1,3 referred 4:1 referring 14:3 refresher 4:25 regularity 6:13 rejected 13:19 relatively 51:21 relevance 28:25 relevant 26:25 29:21 45:19 reliability 3:20 9:14,18,19 11:14,21 12:21 13:13 15:6,23</p>	<p>18:13 20:15,16 20:19 23:8 24:14,18 25:4 26:11 28:14 31:17 33:5,20 35:24 39:10 43:1 45:16 46:8 51:10,15 52:11 reliable 11:8 12:22 13:6 15:10,19,20 17:13 21:23 23:1 24:16 25:22 26:23 31:3 36:17 40:16,20 45:19 46:10 47:5 49:13,23,24 reliably 19:4,23 20:23 21:16 relied 14:4 38:20 52:15 rely 14:15 15:10 relying 39:7,8 remainder 18:18 remand 49:16 remember 32:17 39:12 report 27:8,8 reported 14:5 reports 37:11,12 reputable 4:11 6:8 require 32:2 required 9:12 9:15 20:1,4,7 23:13 30:21 36:6 46:2 requirement 3:25 4:5 5:15 12:3 31:25 32:25 33:1,10 requirements 3:18 4:9 25:2,7 requires 7:25</p>	<p>30:1,3,5 requiring 23:11 reserve 18:18 residual 18:12 41:6 42:5,7,25 43:14,18,19 44:5,10,12,14 44:17,19 47:11 47:15,18,23 48:12,15,16 49:7,8 50:20 50:23 51:19 respect 13:20 31:23 49:15 respond 17:17 Respondent 1:22 2:11 28:8 resulted 14:6 results 7:11 17:8 reversal 39:14 reverse 49:16 52:21 reversed 32:11 reversible 36:13 36:14 right 7:6 10:21 14:23 18:9 22:5 23:6 25:13 26:2,17 27:23 29:25 33:16 36:13 39:22 48:20 ROBERTS 3:3 18:20,22 21:24 22:2,8 26:24 27:13 28:5 36:4,19 44:21 50:11 52:24 53:1 role 8:2 9:1 routine 23:20 row 19:11,12 rule 8:18,20,21 8:25 9:4 10:6 43:17 rules 10:14</p>
--	---	--	---	--

S	<p>searches 35:4 searching 13:5 second 51:10 52:9 security 19:6 see 25:18 seek 23:15,17 seeks 22:17 25:8 seen 48:10 seminar 4:25 52:7 Seminole 32:20 34:8 sense 26:21 52:17 separate 19:8 21:11 23:23 separately 21:11 serious 52:22 service 14:18,23 Services 26:13 set 3:18 22:14 sets 25:1 setting 4:20 13:10 20:17,19 20:24 21:16,19 23:9 24:15,22 25:21 51:17 settings 6:13 15:17 shifts 30:25 shop 32:11 show 5:21 6:7 11:4,13 28:2 30:17 31:3 33:25 49:12 showing 4:10,11 11:22 21:22 showings 21:9 37:20 shown 28:1 shows 37:15 side 14:4 15:22 simple 19:13 simply 36:23 41:10 44:5 46:25 51:20</p>	<p>situation 26:20 26:20 small 16:11 smell 6:5 35:13 42:11 43:9,11 52:17 smelled 43:9 smells 42:22 43:3 smoked 42:24 48:7 50:21 sniffing 27:2,14 Solicitor 1:17 somewhat 13:7 20:16 sort 17:12 41:13 sorts 6:13 16:19 17:24 SOTOMAYOR 4:7 6:16,24 7:4 7:7,21 8:7,16 9:4,8,25 10:10 13:7,21 14:16 19:7,18 20:2 20:10 21:2,5 37:8 38:8 42:20 sound 25:19 South 14:2 so-called 18:11 40:25 50:20,23 speak 23:16 specific 8:4 10:25 27:18 31:14,19 specifically 29:1 specifics 16:23 specified 38:17 specify 38:11 spring 37:4 squirrels 27:22 stakes 26:11 stand 9:18 22:22 23:25 36:1 standard 7:2,5 19:10 20:4,20 standards 7:8</p>	<p>50:1,1,3,4,8 standing 20:13 state 11:7 15:8 29:11,15 30:11 30:14,15,17,19 30:22,24 31:5 38:1 39:24,25 40:6 41:5 44:18 46:11,18 46:20 49:8 states 1:1,12,19 2:7 5:16,16 12:5 18:24 50:3 state's 29:16 40:22 stick 27:19 stop 13:1 strong 12:21 38:18 45:11 strongest 51:5 strongly 21:17 studied 20:9 studies 13:8 20:8 41:7 study 14:2,8,15 19:23 subconscious 17:6,17 subjected 5:1 submit 11:13 submitted 11:19 53:2,4 subsequently 5:13 46:19 substance 40:24 41:20 substantial 4:2 substitutes 38:18 sub-issues 22:12 success 24:23 46:2 successful 5:24 24:22 26:8 successfully 4:17 7:18 9:6</p>	<p>11:17,23 14:22 15:2,3 sufficient 8:13 19:16 23:4 36:16 39:10 40:15 sufficiently 7:14 suggest 13:14 suggesting 51:13 suggests 44:8 support 46:19 48:12 supported 43:24 supporting 1:19 2:8 18:25 49:12 supports 37:23 46:14 48:17 49:8 suppose 10:16 16:1 40:10 49:15 supposed 14:19 suppression 3:19 23:14 30:25 46:20 51:14 supreme 1:1,12 3:16,23 6:2 18:10 20:6 22:13 23:11 24:7,13 25:11 25:18 29:6,9 29:13 30:4,20 31:16,23 37:9 38:23 39:2,12 40:2 43:22 44:16 45:6,8,9 46:14,24 47:7 49:1 sure 25:6 26:25 42:25 survivors 26:16 26:18 suspicion 45:4</p>
----------	--	---	---	---

T	38:25 41:13	10:3,5 28:11	49:12,25 50:2	use 16:21 17:8
T 2:1,1	things 17:24	36:2 39:1,15	50:3,5,7 51:12	26:12,13 31:8
take 25:10 32:12	27:15 38:11	39:20 40:17	treated 9:6	31:10 34:11
taken 14:18	41:12	totally 29:18	trial 3:19 23:3	36:17 52:23
takes 19:22	think 3:17,22	touched 48:8	25:11 28:21	uses 26:15,15
talk 45:5	4:15,18 5:17	traffic 13:1	29:3,20,20	usually 6:20,22
talked 10:14	5:23 7:15,16	train 7:19 8:4	31:3 36:1	U.S 26:12
29:11	8:2,11,12,21	27:10 35:22	40:19	
talking 31:20	8:25 9:3,17,20	52:4	trials 26:7	V
43:5	10:12 11:9,25	trained 3:10	troubled 13:8,22	v 1:5 38:16
Tallahassee	12:2 13:17	5:18,19,22	truck 47:12,16	vacate 49:16
1:22	14:3 15:5,13	10:19 12:7,12	49:2	valuable 52:23
target 19:4	16:18,20,23	16:13,15 19:4	true 28:13 41:14	varies 12:4
team 32:20,22	17:9 18:9 20:4	19:16 24:5	trunks 41:12	variety 22:19
32:23 33:6	20:14,21 21:7	25:20 27:2,6	TSA 26:14	vehicle 3:10,11
34:1,6	22:1,6,18 23:6	33:6,12,18	two 4:13 19:7	48:11 49:19
teams 26:17	23:7,19,21	35:21 36:3,9	21:8 28:3	50:22
tell 19:10 44:4	24:2,24 25:12	38:4 43:11	39:18 42:12,12	vehicles 4:20,21
50:8	25:15,23 26:5	45:10,22 52:17	46:9	5:4,4
tells 43:10	26:23 27:5,18	trainer 47:3	Tying 19:8	verified 41:9
tennis 41:12	27:20,23 29:1	training 4:10,12	type 6:4 9:16	vice 22:12
Tenth 25:17	29:4,13 30:6,7	4:18,18,23 5:2	types 6:4 11:12	view 4:16 8:1
terms 17:15	32:1,2 35:14	5:2 6:4,13,15	typically 24:2	Virginia 25:17
20:8	41:18 45:18	6:17,22 7:5,11	27:11	virtually 4:5
test 4:10 10:5	49:14,20,21	7:14,22 8:3 9:7	U	Vista 10:13
21:23 28:12	51:24,25	9:9,16 10:24	ultimate 33:5	volume 15:14,15
33:5 38:16	third 11:4 52:4	11:3,7,16,18	ultimately 8:13	W
39:16	thought 6:16	11:23 12:14	15:23 45:23	Wales 14:2
tested 4:19 8:22	29:5,8 31:4,5	14:22 15:1,3	understand 16:1	walking 5:3
20:18 22:5	thousands 22:25	16:3,3,16,22	20:2 28:19,24	walks 19:11
46:15,15	22:25	17:1,18 20:20	understanding	want 8:25 12:23
testified 45:23	time 3:13 5:10	20:22 21:9,11	8:20	12:24 13:3
46:21 47:22	12:18 13:11,23	21:12 24:20	understood 33:9	27:21 34:11,12
48:4,9	14:7,25 16:6	25:21 26:1,2,7	37:8	35:11 37:21
testify 36:20,24	18:18 19:24,25	26:8 27:25	undertake 7:16	38:9 39:4
48:14	22:17 25:24	28:17,17,22	unfixed 13:24	wanted 24:8
testimony 5:5	34:22,23 35:3	30:8 31:1,2	unique 20:16	wants 23:14
46:3,16	42:13	32:14 33:2,2	United 1:1,12,19	warrant 10:24
testing 5:25 7:18	times 22:25	33:24 34:3,3	2:7 18:24	19:14
tests 42:1	41:16	36:15,16,21,25	universe 14:12	warrantless
Thank 3:7 18:20	tip 23:1	37:4,10,12,17	16:11	28:13 29:17
18:21 28:4,5	today 15:17	37:20,25 38:1	unprecedented	Washington 1:8
50:11,15 52:24	52:20	38:10 39:3,8,9	22:14 25:1	1:15,18
52:25	tool 20:17 52:23	40:3,11,11,12	unusual 11:10	wasn't 17:25
thing 5:24 10:7	top-performing	40:14 42:16	unverified 44:19	32:19 33:18
17:15 22:9	40:12	45:12,16,24	updated 4:4	41:20 44:12,14
25:13 34:18,19	totality 7:24	46:12 47:1		wasted 34:22,23

wasting 35:3	16:6	40 9:23 12:15		
way 9:13,14	wouldn't 34:16	25:5		
10:22 11:21,22	37:17	40-hour 4:25		
12:25 51:2	wrong 31:24	52:6		
52:14	40:21 41:3	<hr/>		
ways 17:18	49:2,15	5		
Wednesday 1:9	<hr/>	50 2:14 45:1		
week 15:2,2	X	<hr/>		
33:24	x 1:2,7	6		
weekly 5:2	<hr/>	60 14:10		
11:17 14:25	Y	66 45:13,20		
34:2	year 11:18 12:17	<hr/>		
weeks 36:9	38:7 52:5	7		
42:12	years 14:5 25:5	70 14:14,14		
weight 24:1	York 26:18	<hr/>		
welcome 3:3	<hr/>	9		
well-trained	1	90 46:2		
19:11	1 38:7			
went 10:25 22:3	100 19:23,25			
36:7,15,24	105 52:8			
39:15	106 11:20			
we're 8:13 43:5	11-817 1:4			
whatsoever 50:1	11:06 1:13 3:2			
Wheatley 5:5	113 21:18			
12:12,17 32:22	116 11:20			
34:6,8 38:2	12 13:11,22			
47:22 48:4,9	12:01 53:3			
48:14 51:3	120 9:21 38:4			
52:4	120-hour 4:23			
Willy-nilly	16 5:11 32:18			
35:10	160-hour 12:13			
win 10:1	18 2:7			
winter 38:20	<hr/>			
witnesses 26:8	2			
word 30:7 31:10	2 21:17			
words 27:1,14	2011 45:7			
28:21	2012 1:9			
work 12:9 15:19	22nd 21:18			
47:3	26 14:6			
worked 12:17	28 2:11			
34:1	<hr/>			
working 13:3	3			
27:7 33:23	3 2:4 50:12			
world 15:4,9,17	30 25:5			
worry 48:20	31 1:9			
worse 31:18	32 26:17			
worth 15:14,15	<hr/>			
	4			